

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE ROBERT C. JONES, SENIOR DISTRICT JUDGE
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4 MICHAEL ERWINE, an :
5 individual, :
6 Plaintiff, : No. 3:18-cv-461-RCJ-WGC
7 -vs- : May 14, 2019
8 CHURCHILL COUNTY, a : Reno, Nevada
9 political subdivision of :
10 the State of Nevada; et :
11 al., :
12 Defendants. :
13

14 TRANSCRIPT OF MOTION HEARING

15 APPEARANCES:

16 FOR THE PLAINTIFF: LUKE ANDREW BUSBY
17 Attorney at Law
18 Reno, Nevada

19 FOR THE DEFENDANTS: KATHERINE F. Parks
20 Attorney at Law
21 Reno, Nevada

22 Reported by: Margaret E. Griener, CCR #3, FCRR
23 Official Reporter
24 400 South Virginia Street
25 Reno, Nevada 89501

1 RENO, NEVADA, TUESDAY, MAY 14, 2019, 1:50 P.M.

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3
4 THE COURT: Our last item is Erwin versus
5 Churchill County. Thank you, counsel.

6 Your appearances, please. For plaintiff?

7 MR. BUSBY: Good afternoon, your Honor. Luke
8 Busby appearing on behalf of plaintiff Michael Erwine who is
9 with me in the courtroom today.

10 MS. PARKS: And good afternoon, your Honor.
11 Katherine Parks on behalf of Churchill County.

12 THE COURT: Thank you.

13 This is motion to enforce and motion for leave
14 and to unseal. I'll let you add additional comments. I've
15 reviewed your briefs. Please.

16 MS. PARKS: Thank you, your Honor. Katherine
17 Parks on behalf of Churchill County.

18 Judge, I'm not sure there's too much more that I
19 can add other than what is in our brief.

20 THE COURT: Okay.

21 MS. PARKS: The Court has seen the briefs. The
22 Court has clearly seen the transcript of the ENE, and it's the
23 position of the county that the settlement was reached at the
24 ENE, and that that settlement is enforceable, and that the
25 only condition to the settlement was Churchill County's

1 agreement to remove certain documents from Mr. Erwine's
2 personnel file and that we have done so.

3 THE COURT: He listed them, you've agreed.

4 MS. PARKS: Right. Every one, in fact, and that
5 was something that Mr. Erwine's former counsel stated on the
6 record before Judge Carry in April at a status conference we
7 had.

8 THE COURT: Okay.

9 MS. PARKS: So that's the position of the
10 county. And we're good to go, we're ready to move forward
11 with the settlement that we believe is binding.

12 THE COURT: Thank you.

13 MR. BUSBY: Thank you, your Honor.

14 As a preliminary matter, I will be asking to
15 show some documents that were filed under seal and have not
16 yet been unsealed by the Court. We did file a motion to
17 unseal the entire proceeding, and if the Court so grants we
18 can just show everything.

19 THE COURT: Not yet.

20 I want you to tell me what you're talking about
21 and why that would alter what I perceive, too, to be reaching
22 of a settlement in front of a judge who approved.

23 MR. BUSBY: Your Honor, I would like to show you
24 some terms in the mutual release of all claims, and because of
25 this proceeding, insofar as it's open to the public, this

1 document was filed under seal, and it hasn't been unsealed, so
2 I wanted to bring that to the Court's attention before I
3 showed it to everybody in open court.

4 THE COURT: Does the County object?

5 MS. PARKS: I'm not sure what we're talking
6 about.

7 THE COURT: I'm not sure either. I don't know
8 what he's talking about.

9 MR. BUSBY: Your Honor, I have a copy here of
10 the mutual release of all claims.

11 This document was filed confidentially under
12 seal by the County in its motion, and I'd like to address some
13 terms in this document for the Court today, but we're in open
14 proceedings today so I wanted to seek leave from the Court do
15 that, to unseal this before I showed it to you on the record
16 today.

17 THE COURT: You're not going to present it as an
18 exhibit, right?

19 MR. BUSBY: No, I just wanted to point out some
20 terms --

21 THE COURT: Sealed documents -- I'm the judge,
22 I'm certainly able to review sealed documents.

23 MR. BUSBY: Indeed, your Honor.

24 THE COURT: So you're not going to submit it as
25 an exhibit.

1 Any objection to him referring to items or
2 matters within that sealed document?

3 MS. PARKS: None at all, thank you.

4 THE COURT: You may do so.

5 MR. BUSBY: Thank you, your Honor.

6 I'd like to go through four basic points to
7 explain our position here today, your Honor.

8 Number one --

9 THE COURT: What is your position?

10 MR. BUSBY: Our position is that there was a
11 potential compromise reached at the ENE, but it was
12 nonbinding, and I can explain that position thoroughly, your
13 Honor.

14 At the hearing several specific terms were
15 agreed to, but two specific items were left out, number one,
16 what documents to be removed from Mr. Erwine's employment
17 file, and number two, the obligations under NRS 239B.020, and
18 that's really the sticking point as to why my client doesn't
19 want to enter into what was described to him as a nonbinding
20 settlement agreement at the ENE.

21 Now --

22 THE COURT: Is there anyplace you can point to
23 in the transcript where the judge said this isn't binding?

24 MR. BUSBY: Oh, absolutely, your Honor.

25 In our motion, if I may, I think the word

1 nonbinding was mentioned four times in total.

2 THE COURT: Why didn't she ask for the agreement
3 of your client and of yourself? Why did she ask for consent
4 to the agreement?

5 MR. BUSBY: Because there were several terms,
6 underlying terms, that were agreed to, but the -- the
7 agreement was that the nonbinding terms as of today as it was
8 described by the Court would be brought back once the
9 documents were agreed on and what the obligations were under
10 this particular statute were agreed on as well, and that's at
11 the transcript at page 4, line 16.

12 THE COURT: What does it say?

13 MR. BUSBY: And at page 3, line 19. It was
14 specifically stated at the outset that the agreement was
15 nonbinding as of today.

16 THE COURT: What does the transcript say? Not
17 what you say, what does the transcript say?

18 MR. BUSBY: Your Honor, may I pull up the
19 transcript?

20 THE COURT: Sure.

21 MR. BUSBY: We did attach the transcript as
22 Exhibit 1 to the -- our response in opposition to the
23 defendant's motion, and at page 3, line 16, the Court
24 states -- this is at the outset of the recitation of the terms
25 of the agreement after the ENE.

1 "Good afternoon, everyone. We're back on the
2 record having concluded our early neutral evaluation,
3 and I'm happy to report that we do have a settlement
4 which will be nonbinding as of today, and we will be
5 putting those material terms on the record."

6 And so my client, when he heard that, this is
7 going to be nonbinding today, I've got -- there's some things
8 I need to consider as to whether, you know, entering into this
9 agreement is appropriate.

10 He did consider those things, and based on the
11 contents of the statute at issue and the terms of the
12 settlement, the mutual release of all claims as proposed by
13 the County, at the end of the day my client's problem, the
14 reason why he brought the lawsuit isn't resolved by the
15 settlement.

16 I'll be glad to explain that, but --

17 THE COURT: Churchill's counsel will be
18 prepared, please, to cite other parts of the transcript that
19 tell me that it was final.

20 MR. BUSBY: Thank you, your Honor.

21 If I may, I'd like to present to the Court a
22 copy of the statute at issue, and I just want to highlight
23 some provisions.

24 (Discussion held off the record.)

25 MR. BUSBY: Continuing on, your Honor, this is a

1 copy of Nevada Revised Statute 239B.020, and what the statute
2 deals with is what a public safety agency is, which is a law
3 enforcement agency, is required to disclose in response to a
4 request for information about a previous employee.

5 And the rationale behind the statute is
6 self-evident. Law enforcement agencies need to know with a
7 reasonable degree of certainty the background of the people
8 they're considering hiring.

9 And the statute explicitly states that upon
10 request, the agency shall provide information, including
11 information under sub 2 which states the information that a
12 public agency may request pursuant to subsection 1 includes,
13 and if we turn to the applicable provisions here under G and
14 H, a statement regarding whether the employer would rehire the
15 applicant, and, if the employer would not rehire the
16 applicant, the reasons therefor, and, if applicable, a record
17 setting forth the reason the employment of the applicant was
18 terminated and whether the termination was voluntary or
19 involuntary.

20 Now, our reading of this statute is that this is
21 an affirmative duty that's placed on a law enforcement agency
22 when it receives a request for information. Therefore, in
23 response to such a request, a public safety agency such as the
24 Churchill County sheriff's office is required by the law to
25 produce this information.

1 And it doesn't say what form it has to be
2 produced in, it just says they have to tell them why, why the
3 guy doesn't work here any more and whether you would rehire
4 him and what caused him not to work there any more.

5 Now, the mutual release does attempt to address
6 this issue by inserting specific provisions stating what
7 Churchill County would say in response to certain kinds of
8 requests for information from other law enforcement agencies,
9 but on page 4 of 6 it does state that all the terms in this
10 agreement are subject to other requirements under law or by
11 legal process.

12 Now, Churchill County can't waive its statutory
13 obligation to reveal information about a former employee by
14 signing a settlement agreement. It can't change the terms of
15 the statute under a settlement agreement. That's the primary
16 issue that Mr. Erwine has with this, but there are --

17 THE COURT: It can if I order them to.

18 MR. BUSBY: Um --

19 THE COURT: I can order them, in compliance with
20 a case filed in this court, and for reasons -- for purposes of
21 settlement I can order them to -- I can order them to jump
22 through hoops.

23 MR. BUSBY: Your Honor, that brings up the
24 second problem that we have with this agreement which is, when
25 you apply for a law enforcement position in the state of

1 Nevada, you sign something that looks like this, and this is
2 attached to our complaint as Exhibit 8. It's a document --
3 document 1-8 in the court's record, and this is not
4 confidential, this is filed publicly.

5 And whenever you apply for a law enforcement
6 position, you have to sign one of these, and what this says is
7 that we're going to do an investigation of your background,
8 and you waive any right you have to discover any of the
9 information that we obtain in the course of that
10 investigation.

11 So Mr. Erwine can't really ask the question,
12 okay, well, why didn't you hire me in the circumstance, why
13 did my background cause you to make the decision not to hire
14 me.

15 And at the end of the day after the application
16 process is complete, what you receive is something that looks
17 like this, and this is document number 1-13 in the court's
18 record attached to our complaint as well.

19 This is a rejection letter that Mr. Erwine
20 received from the North Las Vegas Police Department, and it is
21 a letter to Mr. Erwine, and it cites why -- basically vaguely
22 why they rejected him, and they say here character issues.

23 Well, Mr. Erwine is quite convinced that the
24 character issues that they're describing in this letter relate
25 to what happened to him at Churchill County, but he can never

1 discover whether that's the case or not because of the waiver
2 he's required to sign when he applies for these jobs.

3 So Mr. Erwine enters into this agreement. He
4 applies for another law enforcement position. He signs a
5 waiver because he's required to do it as a prerequisite to
6 applying. He gets a rejection letter from the other
7 department in the state, and they cite issues that he's
8 convinced have something to do with Churchill County, but
9 because he's required to sign the waiver, he can never
10 determine whether that's the case or not.

11 Therefore -- and that's why I think in the ENE
12 the door was left open for Mr. Erwine to explore the
13 obligations under the statute. That's the term that was used
14 by the Court in describing --

15 THE COURT: You may not be able to discover from
16 North Las Vegas Police Department, but surely, under your case
17 heading, in your settlement and a final order of dismissal,
18 you can make that discovery in this case, can you not?

19 MR. BUSBY: As long as the case --

20 THE COURT: Did you violate our settlement
21 agreement.

22 MR. BUSBY: As long as the case is open, your
23 Honor, but by other terms in the settlement, he's waiving all
24 past and future claims. So he could -- he would not --
25 there's no way in any possible universe that he could discover

1 whether Churchill County was actually abiding by the terms of
2 the settlement.

3 THE COURT: I don't understand your answer to
4 that. Even if the case is closed, he can move to reopen it
5 for failure of Churchill County to comply with the settlement.

6 MR. BUSBY: He'd never have grounds, your Honor,
7 because he would have to -- in order to do that, make an
8 affirmative showing of some fact, not just a rejection letter
9 from another department, of some fact that indicates that the
10 information from that department came from Churchill County,
11 and because of the waiver he's required to sign when
12 applying --

13 THE COURT: Can't he discover and submit to
14 Churchill County "give me any and all referrals or references
15 or responses to references requests that you have made," and,
16 in particular, to the North Las Vegas Police Department?

17 MR. BUSBY: I think in order to do that, your
18 Honor, we'd have to have some basis for asserting a breach of
19 the settlement agreement itself.

20 THE COURT: I would say so, too, but here's a
21 rejection letter.

22 MR. BUSBY: I don't believe that would be
23 sufficient, your Honor, and --

24 THE COURT: Why don't you ask me if it's
25 sufficient.

1 MR. BUSBY: I would envision bringing something
2 like a breach of contract claim in the future, your Honor.

3 THE COURT: Right.

4 MR. BUSBY: It would be something similar to a
5 breach of settlement claim in the future.

6 THE COURT: Right.

7 MR. BUSBY: That's what he would be required to
8 bring. And when I put myself in the position of actually
9 filing that, and filing something that would pass Rule 12
10 muster, I would have to make -- and Rule 8 muster, Federal
11 Rule of Civil Procedure 12 and 8, I would have to make some
12 kind of affirmative showing of an actual breach by Churchill
13 County of the settlement agreement. But it would be
14 impossible for me to make that, your Honor, because I would
15 never have a fact tying something like this to Churchill
16 County, or I'm left in a position --

17 THE COURT: You know, what strikes me, sir, is
18 that you reached a settlement in front of the magistrate judge
19 on the record, we got consent of all parties, and now your
20 client wants something more.

21 He wants an admission from Churchill that they
22 terminated him for illegal reasons, and that's what you're
23 searching for so that you get a court judgment that that --
24 that it's illegal.

25 You reached a settlement, you listed the

1 documents you wanted deleted, they agreed. The only other
2 issue, as you said, was compliance with the Nevada statutes,
3 but you get that if you get a judgment of the Court, even if
4 the settlement isn't incorporated into the judgment. As long
5 as the order confirms the judgment, the settlement, you've got
6 grounds to reopen the case and say they haven't complied
7 either under contempt or breach of contract.

8 So I'm not quite sure I understand what you're
9 really asking me for. You just don't want enforcement, and
10 what I'm leaning towards is because you don't like the
11 settlement you reached, you want more money or you want
12 admission by Churchill County that they were in the wrong --

13 MR. BUSBY: Well, at the end of the day, your
14 Honor, vindication is what my client is ultimately after in
15 this case, and, if I may, your Honor, vindication is an
16 acknowledgment that he didn't do anything wrong when he worked
17 for Churchill County, and what he was accused of doing is not
18 the truth, and that has interfered --

19 THE COURT: Is that what he demanded in the
20 settlement discussion before Judge Carry?

21 MR. BUSBY: Your Honor, unfortunately, I
22 wasn't --

23 THE COURT: "I want vindication, I want
24 acknowledgment that Churchill County was in the wrong," did he
25 demand that?

1 MR. BUSBY: I believe so, your Honor, but this
2 statute doesn't permit --

3 THE COURT: Why did Judge Carry conclude the
4 settlement, the ENE then? Why didn't they keep going on with
5 the ENE and asking against Churchill, "Can you give that"?

6 MR. BUSBY: Well, I believe the way it was left
7 was there were some material terms that were agreed to.

8 THE COURT: "We're coming back for another ENE"?

9 MR. BUSBY: That's possible, your Honor, but --

10 THE COURT: No, no. Is that what Judge Carry
11 said, "You can come back for another ENE"?

12 MR. BUSBY: The way Judge Carry framed it was
13 there was supposed to be a negotiation between parties to take
14 place within 30 days.

15 THE COURT: Outside her presence.

16 MR. BUSBY: Yes, your Honor.

17 And there was supposed to be a status report
18 filed within 14 days of that expiration of that 30-day period
19 indicating what was going on, but that was never filed, and --

20 THE COURT: Okay. Let me let you finish.

21 MR. BUSBY: That was before I appeared in the
22 case.

23 But the problem is the terms of the agreement
24 itself also give Churchill County adequate wiggle room to
25 state orally, in compliance with the statute, what really

1 happened with Mr. Erwine at Churchill County, and there's no
2 way he could ever discover or affirmatively show a Court that
3 that had actually occurred because of the waiver he was
4 required to sign when applying for employment, which I believe
5 is why the settlement was nonbinding.

6 He needed to look into this and think about it,
7 and when he reviewed the terms of the proposed settlement
8 agreement and reviewed the statute and consulted with counsel,
9 yeah, there's some issues with this that aren't going to solve
10 the problem in the case. That's why, in his mind, and the
11 plain language of the Court, the agreement at the ENE is
12 nonbinding.

13 Just addressing the two major cases on point,
14 the *Pamplin* is a conditional settlement case, you know, if you
15 pay me \$10, we'll settle the case. The \$10 is paid, the guy
16 refuses to settle the case. That's pretty open and shut.
17 That's not what's going on here.

18 This wasn't just a condition, this was further
19 negotiations and determinations to be made in these two
20 categories what documents were to be provided and obligations
21 under the statute.

22 The *Doi* case basically just stands for the
23 proposition that a complete settlement that's entered into the
24 record orally by the Court is binding on the parties. That's
25 not what happened here. If the Court says multiple times on

1 the record that the settlement is nonbinding, it can't be
2 complete.

3 With that, your Honor, I'd glad to answer any
4 questions you may have. Thank you for your time.

5 THE COURT: Thank you.

6 Please, from the County, be sure to cite to me
7 portions of the transcript that suggest this is final and not
8 just simply a nonbinding --

9 MS. PARKS: Absolutely, your Honor.

10 And I would say, too, before I move on from
11 counsel's argument, in fact, the *Pamplin* decision that we
12 cited in our brief, and it's attached as an exhibit, is
13 exactly on point.

14 If you look at the transcript of the post ENE
15 proceedings, and specifically at page 5, Judge Carry goes into
16 a discussion about what the terms of the settlement were to
17 be, and she says the following:

18 "And in this particular case, as I stated,
19 this is a nonbinding settlement that is contingent on
20 the following, that your attorneys, Mr. Guinasso and
21 Ms. Parks, will meet within the next 30 days to
22 determine which records shall be scrubbed or removed
23 from your employment record and to discuss the
24 specific obligations for the information that can be
25 provided pursuant to NRS 239B.202. Do you understand

1 that, sir?

2 "MR. ERWINE: Yes.

3 "And that if they are unable to agree on any
4 of those particular conditions or documents, that
5 your attorney, as well as Ms. Parks, will file a
6 joint status report under seal with the Court within
7 14 days of that particular meeting, and, together
8 with that document, they will also file under seal
9 any disputed documents to be presented to the Court.
10 Do you understand that?"

11 "Yes.

12 "From that point the Court will then hold a
13 hearing to determine whether or not the parties can
14 reach agreement on the disputed documents. Do you
15 understand that?

16 "MR. ERWINE: Yes.

17 "And, finally, if the parties and the Court
18 are not able to agree, and the parties reach an
19 impasse as to those particular documents that can and
20 should be removed, or any of the requirements under
21 the statute, that you will have the right, as will
22 the defendant have the right, to withdraw from this
23 settlement. Do you understand that, sir?"

24 And the Court goes on to set forth additional
25 material terms that were agreed upon by all of the parties and

1 in open court.

2 So the only thing that was -- that made that
3 settlement nonbinding on that particular day, your Honor, was
4 the fact that there had to be an agreement over the documents
5 to be removed, and there was no dispute.

6 Churchill County received a copy of the
7 documents from prior counsel, "These are the ones we want
8 scrubbed from the file," and we said, "Fine."

9 We provided a release of all claims that the
10 Court I know has had an opportunity to review in draft form
11 and said, "Here's the mutual release."

12 As I stand here, I believe that the mutual
13 release complies with all of the material terms that were
14 reached at the ENE. More to the point, your Honor, no one,
15 not Mr. Erwine nor either of his lawyers, has ever said, "We'd
16 like you to consider revisions to the mutual release of all
17 claims to say the following."

18 So this settlement was binding. It was
19 contingent upon the happening of an event. Churchill County
20 satisfied the condition when we said, "Absolutely, we'll
21 remove all of the documents requested from the file."

22 THE COURT: So what is this dispute about,
23 please? What -- I don't want you to tell me what you believe
24 occurred, but what do you believe plaintiff contends occurred
25 constituting an unlawful termination, and what he wants

1 excluded, and whether or not Churchill County has bound itself
2 to not disclose such?

3 MS. PARKS: Well, and I think, your Honor, if
4 I'm -- if I'm --

5 THE COURT: The settlement provided for
6 \$10,000 --

7 MS. PARKS: Correct.

8 THE COURT: -- from Churchill to plaintiff,
9 right?

10 MS. PARKS: That's correct.

11 THE COURT: And, of course, certain
12 nondisclosures and scrubbing records.

13 MS. PARKS: That's absolutely correct, your
14 Honor.

15 What came up during the ENE with respect to
16 Chapter 239B.020 is the fact, as pointed out by counsel, that
17 there is a statute that says if an employer such as Churchill
18 County receives a request from a law enforcement agency about
19 the background of a candidate, what the statute actually says
20 in paragraph 1, which I think is very applicable here, it
21 says,

22 "Upon the request of a public safety agency,
23 an employer shall provide to the public service
24 agency" -- public safety agency, excuse me --
25 "information if available about an employee on

1 subject matters A through G." Excuse me, A through
2 H.

3 In this case, Churchill County agreed to the
4 removal of every document requested by Mr. Erwine from his
5 personnel file.

6 We also agreed on each and every way Churchill
7 County would respond to subsection 2 of that statute and the
8 information that would be provided to a prospective employer.

9 THE COURT: Delineate that a little bit. Give
10 me an example of a document or harmful document that was to be
11 scrubbed, and, number two, most importantly, tell me what
12 Churchill County committed themselves to by way of
13 nondisclosure.

14 MS. PARKS: Absolutely. The documents that were
15 primarily in dispute, I believe, your Honor, although no
16 discovery was done when we did the ENE, are documents of this
17 nature. Mr. Erwine had notes, Mr. Erwine had -- there were
18 documents in the file about Mr. Erwine conducting a
19 semi-investigation of alleged wrongful conduct on the part of
20 his fellow deputies, there were some documents in the file
21 that related to that.

22 There was a memorandum in the file that related
23 to his termination. He was allowed to voluntarily resign so
24 there was a memorandum in the file about what led to his
25 separation from employment.

1 Those documents were removed. Those documents
2 will no longer exist. They won't exist to share with
3 prospective law enforcement employers, and they will not be
4 there.

5 So what -- in fact, Churchill County is
6 committing itself to be very, very careful and putting itself
7 out there to comply with this statute while entering into this
8 settlement agreement.

9 There is not going to be negative information
10 that remains in Mr. Erwine's personnel file to ever be shared
11 with a prospective employer.

12 THE COURT: You committed yourself in the
13 agreement to not disclose that to another agency.

14 MS. PARKS: That is correct.

15 THE COURT: And how and where?

16 MS. PARKS: Your Honor, that entire section is
17 addressed at the very bottom of page 1 and the top of page 2
18 of the mutual release of all claims where it indicates that
19 Churchill County would give a neutral recommendation to a
20 prospective employer that would include the date on which
21 employment began, the date on which it ended, compensation,
22 and these terms are what is required by the statute to be
23 provided, a list of the compensation Mr. Erwine was provided,
24 a copy of Mr. Erwine's application for employment which
25 Mr. Erwine submitted to the county and did not request be

1 removed.

2 THE COURT: Are you allowed to provide an answer
3 to the question whether he was terminated or resigned?

4 MS. PARKS: Well, what we intend to say is
5 addressed there, and what we -- at the top of page 3, in the
6 event a public safety agency requests information concerning
7 the reason why Mr. Erwine was terminated, the county will
8 advise that Mr. Erwine's termination from employment was
9 voluntary. That is what will be said, and that is all.

10 THE COURT: And you believe you're committed to
11 that.

12 MS. PARKS: Absolutely, absolutely.

13 THE COURT: And do you acknowledge that he would
14 have the right to seek contempt or breach if you violated
15 that?

16 MS. PARKS: Absolutely. I think if either party
17 were to violate any terms of this mutual release, litigation
18 could ensue, absolutely.

19 You know, if there are specific problems with
20 respect to the mutual release language --

21 THE COURT: I need to ask counsel about that,
22 whether that satisfies him in light of your acknowledgment.

23 MS. PARKS: Right.

24 THE COURT: But, more importantly, answer my
25 first question -- well, I guess you've answered it. You've

1 given me your answer as to whether Judge Carry said this is a
2 final settlement.

3 MS. PARKS: Absolutely. And I didn't read the
4 entire transcript, your Honor, it's not long, but each and
5 every one of the terms of the agreement were gone over by
6 Judge Carry, not only with Mr. Erwine, but with my clients as
7 well, and --

8 THE COURT: But she said nonbinding.

9 MS. PARKS: She said nonbinding contingent upon
10 this event, and in the event the parties were unable to reach
11 an agreement about the documents --

12 THE COURT: They were supposed to come back.

13 MS. PARKS: -- we were supposed to come back.

14 THE COURT: And we didn't.

15 MS. PARKS: And we didn't.

16 And with respect to the idea, you know, that the
17 parties were required to file some sort of status report that
18 didn't happen within 14 days, that's because as far as
19 Churchill County knew, there was never a disagreement.

20 But one of the other things that I find
21 troubling about the fact that we are here talking about this
22 motion to enforce settlement, trying to answer questions
23 about, you know, what does Mr. Erwine really want here, also,
24 your Honor, is that last week Mr. Erwine, through his
25 attorney, filed a motion for leave to amend to add new claims

1 and a new party.

2 I filed a separate motion requesting additional
3 time to respond to that which I'd like to raise at some point,
4 but I think what's going on here is just Mr. Erwine has
5 changed counsel and changed his mind.

6 THE COURT: Thank you.

7 Reply? The first question, I guess, is doesn't
8 that satisfy you?

9 She's just acknowledged on the record that you
10 can bring contempt or breach actions if she violates, and
11 that's what she's committed to. She will not, in light of the
12 statute and in light of the order, the final judgment order,
13 she's acknowledged and committed on behalf of the county that
14 you can bring an action if they violate.

15 MR. BUSBY: And, your Honor, we certainly
16 appreciate that representation, but it reminds me of one of my
17 favorite sayings in the law, which is theory and practice are
18 the same in theory but not in practice. It's a great
19 theoretical.

20 THE COURT: But you're here, you practice,
21 you're here, you're in the real world, you're here.

22 MR. BUSBY: We are, your Honor.

23 THE COURT: In front of the person that would
24 impose contempt.

25 MR. BUSBY: And we appreciate that, most

1 certainly, your Honor, and we appreciate the Court's power,
2 inherent power, to enforce agreements like this.

3 But we have to place ourselves in Mr. Erwine's
4 position in the future when he's stuck with another rejection
5 letter that says that he has, you know, essentially ethical
6 issues, and he has to, in order to bring a contempt action,
7 figure out if it was Churchill County that created the record
8 that led to that finding by another police agency.

9 And because of the structure of the statute --
10 it's an unusual statute, as you often find in the context of
11 the rules applying to employment of peace officers, is that it
12 doesn't allow him to do that. There's no way he could have
13 the evidence in order to support a claim for such a finding by
14 the Court. So he's kind of stuck in this *Catch 22* by virtue
15 of signing this agreement.

16 And another thing that really is problematic for
17 him is that the settlement agreement contains a provision that
18 says that if they're compelled by legal process to provide
19 answers, they can. That undermines the whole premise that
20 they won't otherwise answer questions about him, and there's a
21 mutual nondisparagement agreement.

22 Now, the allegations in Mr. Erwine's complaint
23 are quite serious. He was --

24 THE COURT: It's a whistle blower complaint.

25 MR. BUSBY: In essence, your Honor, yeah.

1 And after he was fired there were extremely
2 damaging materials inserted into his employment record that
3 have already been shared with at least eight other law
4 enforcement agencies, materials that he was never given a
5 chance to dispute or review before they were placed in his
6 file.

7 He only found out about them after he was
8 applying for these other jobs and kept receiving these
9 rejection notices with things like, hey, character issues?
10 What does that mean?

11 So the level of, you know, settlement agreement
12 not only by its terms requires a certain level of trust that
13 it's going to be followed through with, and if Mr. Erwine
14 doesn't have the means, the practical means, to enforce this
15 in the future, it's not worth anything to him. It doesn't
16 solve his problem for bringing the suit.

17 On the record over and over again at the ENE it
18 was stated that the agreement was nonbinding. A layperson
19 hearing that over and over again stated by a judge is going to
20 believe it's true.

21 The reasons for rejection are highly technical,
22 legal, they involve the interaction of the statute on
23 provisions of law related to the enforcement of settlement
24 agreements, the terms of the settlement agreement itself, and
25 when he had questions about it, they weren't satisfactorily

1 answered.

2 But his concerns about this are quite
3 legitimate, and the Court --

4 THE COURT: Tell me what your position would be
5 in filing of a motion for contempt or a breach, a complaint
6 for breach, with respect to disclosures made by Churchill in
7 response to reference requests before the settlement was
8 reached? What would be your position on a motion for
9 contempt?

10 MR. BUSBY: Well, our position --

11 THE COURT: In other words, if they sent
12 portions of the record to other employment agencies, police
13 agencies, what would be your position in the request for
14 contempt? Do you have a remedy there?

15 MR. BUSBY: Well, that they violated the promise
16 in the mutual release that they would remove the materials
17 from his record and they wouldn't share disparaging
18 information about him.

19 But there's no way he's ever going to know
20 whether that happened. He doesn't have an open case in which
21 he can issue a subpoena to Churchill County. He, by virtue of
22 applying for a job like this, has to sign a waiver that says
23 he can't get that information from these third-party law
24 enforcement agencies.

25 And, in fact, during the course of this case I

1 think subpoenas have been issued to six or seven of them, and
2 there may be an issue we might be bringing before the Court,
3 but they have -- you know, it's going to be a lot of work.

4 There's a lot of barriers there to seeking
5 disclosure of that information in the context of a law
6 enforcement agency, and there's perfectly good legislative
7 policy rationale for those being in place, and a law
8 enforcement agency needs to have really wide discretion, they
9 need to know who they're dealing with, but Mr. Erwine needs to
10 be able to defend himself as well, your Honor.

11 THE COURT: Okay. I'll take it under
12 submission. I'll issue an order forthwith.

13 MR. BUSBY: Thank you.

14 MS. PARKS: Your Honor, may I be heard on one
15 other issue?

16 THE COURT: What other issue?

17 MS. PARKS: As I indicated, last week counsel
18 filed a motion for leave to amend his complaint to add an
19 additional -- an additional party and additional causes of
20 action. Our opposition or response to that motion would be
21 due tomorrow.

22 Yesterday -- and I haven't had a chance to talk
23 with counsel about this, I filed a motion requesting an
24 extension of time for us to respond to that for a period of
25 14 days after the Court decides this pending motion. I'd like

1 to save my clients the expense of having to respond to that
2 before the Court makes a decision on the motion.

3 THE COURT: Well, that motion goes to Judge
4 Carry, right?

5 MS. PARKS: Oh, I suppose.

6 MR. BUSBY: I believe it goes to Judge Cobb,
7 your Honor, but I'll represent --

8 THE COURT: Judge Cobb.

9 MR. BUSBY: I'll represent today, your Honor,
10 that we have no objection to stipulating to the request.

11 THE COURT: Okay.

12 MS. PARKS: Very good. Thank you, counsel.

13 THE COURT: Thank you so much.

14 The Court will issue an order, and thank you for
15 your attendance.

16 -o0o-

17
18 I certify that the foregoing is a correct
19 transcript from the record of proceedings
in the above-entitled matter.

20 /s/Margaret E. Griener 7/16/2019
21 Margaret E. Griener, CCR #3, FCRR
22 Official Reporter
23
24
25